SOVEREIGN GENERAL INSURANCE SDN. BHD.

v.

KOH TIAN BEE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 148 OF 1985]
27 OCTOBER 1987

BANKRUPTCY: *Creditor's petition struck off - Whether open to challenge execution proceedings - No application made by respondent to set aside execution orders.*

The appellant had obtained a judgment against the respondent for a sum of RM360,749.46. The respondent failed to satisfy the judgment.

The appellant by a writ of seizure and sale applied for leave to levy execution on the respondent's 75,000 ordinary shares. An order to sell the said shares by way of private treaty was obtained. The sum was paid to the appellant to set off the judgment debt.

Thereafter a bankruptcy notice was served on the respondent by substituted service. The respondent failed to comply with the said notice. The appellant took out a creditor's petition, this was struck off in the High Court.

Hence this appeal.

The respondent argues that he was unable to contest the proceedings as the notice of sale was not served on him properly. Also in the execution proceedings insufficient credit was given on the value of his shares. He further contended that as the service of the notice of sale was invalid according to O.43 r.4(3) of the Supreme Court Rules 1957 the bankrupcy notice had become invalid.

Held:

[1] It is not open to the learned Judge in the exercise of his jurisdiction in bankruptcy proceedings to strike out the creditor's petition by disputing the validity of the orders made in earlier execution proceedings when the orders had not been set aside particularly so when the respondent had not at any time taken any step to have it set aside. Unless and until the order in the execution proceedings has been set aside it is binding and effective.

[2] It is not clear whether the respondent was also making a cross demand or challenging the amount actually owing as Counsel for respondent contended that all orders made previously in the execution proceedings were null and void. If the respondent was making a cross demand he must quantify what the shares were worth and not just allege his shares were worth considerably more. The burden of proof is on the respondent to show by the affidavit or affidavits three things, firstly, he must show that he has a cross demand against the creditor which is genuine; secondly, he must show that the cross demand could not have been set up in the action in which the judgment relied on by the creditor was obtained; thirdly, he must show that the cross demand need not be for a liquidated sum or even for a sum of money at all so long as it is capable of being quantified in terms of money and it is quantified in the affidavit or affidavits.

[3] Where a bankruptcy notice has been served, and not complied with in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively *per se* cause the notice to become defective or irregular, so as to require the protection of s. 131 of the Bankruptcy Act 1967.

[4] As the respondent had made no mention of any irregularity in his notice of intention to oppose petition the Supreme Court was unable, as urged by the respondent, to say that the bankruptcy notice was irregular and invalid and that the respondent had not committed an act of bankruptcy within the meaning of s. 3(1)(c) of the Bankruptcy Act entitling the petitioning Creditor to petition herein.

[Appeal allowed.]

Cases referred to:
Kamarudin v. United Motor Works Pte. Ltd. [1982] 1 MLJ 126
In re Easton [1893] 10 Mor 111
Issacs v. Robertson [1984] 3 All ER 140
Marsh v. Marsh [1945] AC 271
MacFoy v. United Africa Co. Ltd. [1962] AC 152
Re Beauchamp [1904] 1 KB 572
Re Flatau[1889] 22 QBD 23
Re Howell [1915] 84 LJKB 399
Re a debtor (No. 75N of 1982, Warrington), ex parte the debtor v. National Westminster Bank [1983] 3 All ER 545

Legislation referred to:
Bankruptcy Act 1914 [UK], s. 147(1)
Bankruptcy Act 1967, ss. 3(1)(c), (1)(i), (2)(ii), 131
Rules of the Supreme Court 1957, O. 43 r. 4(3)

Other source referred to:
The Law and Practice of bankruptcy, Williams and Muir Hunter, 19th Edn., p. 492

For the appellant - Cyrus Das (Mathew Thomas with him); M/s. Mathew Thomas & Co.
For the respondent - D.P. Naban (M.A. Sreenevasan with him); M/s. Skrine & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal and stated that we would give our reasons. We do so now.

The appeal is against the decision of the learned Judge in striking off the creditor's petition. The appellant is the judgment creditor and the respondent the judgment debtor.

On 23 January 1976 the appellant obtained a judgment in the High Court (Civil Suit No. 817 of 1974) against the respondent in the sum of RM360,749.46 with costs together with interest at 6% per annum on the sum of RM100,000 only. The respondent failed to satisfy the judgment.

On 24 September 1979 by a writ of seizure and sale the appellant applied for leave to levy execution on the respondent's 75,000 ordinary shares in Global Insurance Co. Sdn. Bhd. (formerly known as Sovereign General Insurance Sdn. Bhd.). On 25 January 1980 these shares in the respondent's name were eventually changed and issued to the Sheriff to satisfy the judgment. On 20 June 1980 the Sheriff obtained an order to sell the said shares by way of private treaty to one of the shareholders Mr. Tan Kim Wah at a price of RM75,000 at RM1 per share. This sum was paid to the appellant to set off the judgment debt.

On 20 November 1980 a bankruptcy notice was issued and addressed to the respondent at No. 118, Jalan 17/14, Petaling Jaya, Selangor. This was the address given by the respondent himself in his affidavit sworn on 28 August 1974. The particulars of the debt were set out in the said notice. Interest of 6% per annum was based on RM360,769.46 when according to the Court order it should only be on RM100,000. This will have to be corrected when the final amount is worked out. As the said notice could not be served on the respondent substituted service was allowed by advertisement in the national newspapers. Despite this the respondent failed to comply with the said notice. So the appellant took out the creditor's petition. The respondent gave notice of his intention to oppose the said petition. The matter came up for hearing before V.C. George J on 5 June 1984 when it was adjourned to 6 July 1984 before Abdul Razak J. After hearing the parties he struck off the said petition with costs. Hence the appeal.

The respondent complained that the notice of sale was not served on him properly and that he was unable to contest the proceedings. His case is that in the execution proceedings insufficient credit was given on the value of his shares which were taken by the Sheriff in execution. He therefore contended that as the service of the notice of sale was invalid according to O. 43 r. 4(3) of the Supreme Court Rules 1957 which was then in force, the bankruptcy notice had become invalid. The learned Judge took the view that the notice of sale had not been served according to rule and that the respondent was not able to contest the selling price or the right to sell or to fetch the highest price to lessen his debt or to enable him, at the eleventh hour, to procure money to settle his debt. He was of the opinion that the bankruptcy notice was presented prematurely before the share price was determined. He was aware that the Court had approved the price but thought that it was due to lack of contest by the respondent. In support of this position the appellant cited *Kamarudin v. United Motor Works Pte. Ltd.* [1982] 1 MLJ 126, to show that though the notice had not been sent according to the prescribed rules it did not become void but was only an irregularity. The learned Judge held that the failure to comply with the rule vitiated the sale.

In the exercise of his jurisdiction in bankruptcy proceedings the learned Judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice it was laid down as early as 1893 that the Court could not go behind the judgment. See *In re Easton* [1893] 10 Mor 111. Even if there has been an irregularity in the service of the notice of sale it is not open to the respondent in this case to challenge the execution proceedings. Under s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set off or cross demand which equals or exceed the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions it was wrong for the learned Judge to strike out the creditor's petition.

Further, we do not think it is open to the learned Judge in the exercise of his jurisdiction in bankruptcy proceedings to strike out the creditor's petition by disputing the validity of the orders made in earlier execution proceedings when the orders had not been set aside. This is particularly so when there has been no application by the respondent to set aside the execution orders. The two orders were made on 25 January 1980 and 20 June 1980. By an order dated 25 January 1980 the shares in the respondent's name were taken in execution and issued in the Sheriff's name. Unless and until this order has been set aside it is binding and effective. The respondent has not at any time taken any step to have it set aside.

As Lord Diplock, delivering the judgment of the Privy Council, in *Issacs v. Robertson* [1984] 3 All ER 140 at p. 143, explained in the following passage at p. 143:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a Court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside...

After pointing out that in neither of the two Privy Council cases of *Marsh v. Marsh* [1945] AC 271 and *MacFoy v. United Africa Co. Ltd.* [1962] AC 152, nor in any other case could it be found that any order of a Court of unlimited jurisdiction had been held to fall in a category of Court orders that could be ignored because they were void *ipso facto* without there being any need for proceedings to have them set aside he went on to stress:

> ...The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the Court that made it on application to that Court; if it is regular it can only be set aside by an appellate Court on appeal if there is one to which an appeal lies.

An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp* [1904] 1 KB 572. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice. *Re Flatau* [1889] 22 QBD 23; *Re Howell* [1915] 84 LJKB 399.

It is not clear whether the respondent was also making a cross demand or challenging the amount actually owing as Counsel for respondent contended that all orders made previously were null and void. If the respondent was making a cross demand he must quantify it. He just cannot come to Court and say his shares were worth considerably more. The burden of proof is on the respondent to show by the affidavit or affidavits three things which were stated clearly by Warner J in *Re a debtor (No. 75N of 1982, Warrington), ex parte the debtor v. National Westminster Bank* [1983] 3 All ER 545 at 553 as follows:

> ... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, the cross-demand must be put forward in good faith and must have a reasonable probability of success, or, as it has also been expressed, must give rise to a triable issue. In the latter respect, there is no hard and fast rule as to the degree of proof required. It depends in each case on the particular facts and circumstances of that case. Second, the affidavit or affidavits must show that the cross-demand could not have been set up in the action in which the judgment relied on by the creditor was obtained. Third, the affidavit or affidavits must show that the cross-demand need not be for a liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it.

Proviso(ii) to subsection (2) of s. 3 reads:

> 3(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner.
>
> Provided that a bankruptcy notice:
>
> (i) ...
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of

> such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Under proviso(ii) a notice demanding a greater amount would not be liable to be held bad and incapable of amendment.

Williams and Muir Hunter on The Law and Practice of Bankruptcy, 19th Edn., at p. 492 under the heading **Formal defect not to invalidate proceedings** refer to s. 147(1) of the English Bankruptcy Act 1914 which is word for word the same as our s. 131.

> 147.(1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

Where a bankruptcy notice has been served, and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively *per se* cause the notice to become defective or irregular, so as to require the protection of this section.

The respondent gave notice of intention to oppose petition but made no mention of any irregularity. It is fair to say that if one wants to challenge the validity of a bankruptcy notice one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of s. 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein.

For reasons given we allowed the appeal.

Also found at [1988] 1 CLJ 155